Supreme Court, U. S.
FILED
AUG 11 1978
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1978

No. 78-244

WINSTON E. FISHER,

Petitioner,

v.

THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ALBERT ROGART, NORMAN RUBENSTEIN and COMMUNITY SCHOOL BOARD, DISTRICT 18,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Printinghouse Press – Bar Ass'n Steno Serv. (Appeals Section) 212-687-0384

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The petitioner Winston E. Fisher respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on March 1, 1978.

OPINIONS BELOW

There was no formal opinion of the District Court. Excerpts of the transcript in that Court, including the judge's statement on dismissal of the complaint, are reproduced in Appendix C to this Petition.

The opinion of the Court of Appeals has not yet been reported. It is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on March 1, 1978. A timely petition for rehearing en banc was denied on May 15, 1978, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1)

QUESTION PRESENTED

In rebutting a prima facie case of racial discrimination in an individual employee's Title VII action, must an objective, performance-based criterion (here, punctuality) be shown by the employer by comparative data to have been applied to the complainant on a non-discriminatory basis?

STATUTORY PROVISION INVOLVED

This case involves subdivision a of §703 of Title VII of the Civil Rights Act of 1964, 78 Stat. 255, as amended by §8 of P.L. 92-261, March 24, 1972, 86 Stat. 109, 42 U.S.C. 2000e-2(a). This

subdivision is reprinted in Appendix D p. 25a, infra.

STATEMENT OF THE CASE

Fisher, petitioner herein, proved a prima facie case of racial discrimination in employment under the "disparate treatment" theory of McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). This much was tacitly conceded by respondents at page 14 of their brief in the Second Circuit Court of Appeals (Appendix E). The point was also subsumed in the Opinion Below (Appendix A).

The District Judge, Hon. Jack B. Weinstein, dismissed the complaint on his own motion because Fisher's own case implicitly established that respondents' rejection was based on Fisher's employment record with respect to punctuality (7a-14a, 19a-20a).

Fisher's trial attorney argued that respondents had not shown their employment practices with respect to Fisher to be nondiscriminatory (8a, 10a, 15a, 12a-13a). Citing McDonnell Douglas Corp. v. Green, supra, he argued that an imperfect record for punctuality was, standing alone, insufficient as a matter of law to rebut Fisher's prima facie case (8a, 10a, 16a, 19a).

In the Court of Appeals for the Second Circuit, Fisher repeated the same argument and cited McDonald v. Sante Fe Trail Transportation Co., 427 U.S. 273 (1976) to demonstrate the illogic of extending preferred treatment to white employees with less perfect records for

punctuality. See Point II of Fisher's brief in the Second Circuit Court of Appeals (Appendix F).

The Court of Appeals affirmed, expressly rejecting all Fisher's arguments (Appendix A). Fisher had vigorously argued that the policy of Title VII and the decisions of this Court would be severely limited unless interpreted to require comparative data as part of respondents' rebuttal (Appendix F, supra).

Fisher concedes here, as he did in both lower courts, that punctuality is a legitimate employment standard (cf. Appendix A).

But the argument is pressed here, as it was below, that the employer's rebuttal evidence must include comparative data on the punctuality of the preferred white employees in order to be complete.

The record is barren of such proof, Fisher's comparative data having been rejected.* Thus, Fisher's case did not

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* Fisher had introduced his own comparative data to prove "pretext" under McDonnell Douglas Corp. v. Green, supra, but such evidence was contested by respondents as relating to the wrong group of employees. See pages 12-14 of Respondents' Brief in the Court of Appeals (Appendix G). The Court of Appeals apparently accepted this view (Appendix A).

include his employer's rebuttal.

REASONS FOR GRANTING THE WRIT

1. The Federal Question Herein Has Not Heretofore Been Specifically Determined by this Court.

This Court has recently addressed the nature of evidence necessary to rebut a prima facie case of racial discrimination under the "disparate treatment" theory of McDonnell Douglas Corp. v. Green, supra. See Furnco Const. Corp. v. Waters, ___ U.S. ___, 98 S.Ct. 2943 (1978). In that opinion, this Court unanimously (on the point involved) reaffirmed its 1973 ruling in McDonnell Douglas, in the following language:

> "To dispel the adverse inference from a prima facie showing under McDonnell Douglas, the employer need only 'articulate some legitimate nondiscriminatory reason for the employee's rejection.' McDonnell Douglas, supra, 411 U.S., at 802." Furnco Const. Corp. v. Waters, supra, ___ U.S. ___, 98 S.Ct., at 2950.

However, the particular facts in Furnco and the way in which the Circuit Court of Appeals had decided that case, did not lead to a discussion by this Court of the question presented here.

Furnco did not involve a claim of discriminatory application of a legitimate standard, as in the case at bar.

Both McDonnell Douglas, supra, and its

"indistinguishable" companion, McDonald v. Santa Fe Trail Transp. Co., supra, 427 U.S., at 282, stand for the proposition that the reason given by the employer in rebuttal must be free from the taint of discriminatory application.

However, neither McDonnell Douglas nor McDonald, involves the claim made here, that an objective, performance-related standard was not shown by the employer to have been applied in a "nondiscriminatory" manner as part of his rebuttal case.

The theft of property in McDonald and the obstruction of the employer's traffic arteries in McDonnell Douglas bear little resemblance to the more commonplace, performance-related standards, such as punctuality, the standard at issue in the case at bar.

The analysis contained in McDonnell Douglas is "a sensible, orderly way to evaluate the evidence in light of common experience as it bears on the critical question of discrimination." Furnco, supra, 78 S.Ct., at 2949.

Common experience in Title VII cases leads to a common-sense demand for comparison with the employment records of others who were preferred when a performance-related standard is advanced as a non-racial reason for the employee's rejection. Obviously, such comparison is best presented by the employer, who made the challenged determination to reject the complainant.

This case presents a new application of the rule established in McDonnell

Douglas and McDonald: comparative data must be included as part of the employer's rebuttal case when employees of another race are said to be preferred, as in the case at bar, on the basis of performance.

2. The Federal Question Herein Has Been Decided Below in a Way Which Is Not in Accord with the Applicable Decisions of this Court.

Once the proffered justification is known, the employee must be given the opportunity to introduce evidence that such justification is merely a pretext for discrimination. This Court reaffirmed this principle in Furnco, supra, 98 S.Ct., at 2950.

Fisher was given that opportunity in this case, but failed to persuade the lower courts with such comparative data as he was able to obtain through the federal discovery process. This situation is probably not atypical, given differing financial and legal resources as between employer and employee.

This point is that opportunity to prove pretext in no way diminishes this Court's requirement in McDonnell Douglas and Furnco that the reason for rejection must be shown by the employer to be legitimate and nondiscriminatory.

The invocation of a commonplace, performance-related criterion, standing alone, is incomplete rebuttal where employees of another race have been preferred over complainant. One necessarily waits in anticipation to hear how the preferred employees performed.

The decision below is at odds with McDonnell Douglas and McDonald, and especially with the common-sense approach in Furnco, by its acceptance of a performance-related criterion at face value, without benefit of comparative data on the preferred employees. See Flowers v. Crouch-Walker Corp., 552 F2d 1277 (Seventh Circuit, 1977), discussed below.

Due to the widespread use of performance-related criteria in Title VII cases, the public importance of the question presented is obvious.

3. The Decision Below Conflicts with the Seventh Circuit Court of Appeals as to the Proper Interpretation of this Court's Opinion in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

On oral argument before the Second Circuit Court of Appeals, Fisher's counsel submitted a copy of the Seventh Circuit's decision in Flowers v. Crouch-Walker Corp., supra, 552 F2d 1277 (1977).

The Flowers case was cited again in Fisher's petition for rehearing en banc, at page 5 thereof.

The Flowers case and the case at bar are remarkably similar on their facts, both procedural and substantive. The Second and Seventh Circuits reached opposite results due to their respective interpretations of this Court's decision in McDonnell Douglas, supra.

The Seventh Circuit reversed and remanded due to lack of comparative data with respect to the performance of the preferred employees of another race.

The Second Circuit affirmed the judgment below in an appeal squarely presenting the same issue.

In a unanimous opinion, the Seventh Circuit panel stated,

> "The record is barren of any evidence indicating how plaintiff's work compared to the work of others." Flowers, supra, 552 F2d, at 1284.

The same opinion quoted the Fifth Circuit, as follows:

> "'Comparative evidence lies at the heart of a rebuttal of a prima facie case of employment discrimination.' Fast v. Romine, Inc., 518 F2d 332, 339 (5th Cir., 1975)."

The decision below conflicts with these Circuit Court decisions by accepting the assertion of a performance-related criterion at face value, without any evidence concerning the punctuality of the preferred employees.

In Flowers, as in the case at bar, the employer was said by the District Court to have proved his rebuttal case "out of the mouths" of the Title VII complainant's witnesses. Flowers, supra, 552 F2d at 1282. But in both cases, the record was barren of comparative data, Fisher's data from federal discovery having been rejected as pertaining to the wrong group of employees.* Thus, in both cases, the supposed "rebuttal" unwittingly proved by the hapless employee was in reality incomplete.

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* See footnote, p. 4, supra.

The procedural and substantive posture of both cases was aptly described in the Seventh Circuit opinion:

> "The [district] court's finding presumes that the other bricklayers did not commit errors of the same degree of seriousness as those admitted by the plaintiff. Rebuttal of a prima facie case of racial discrimination must rest on a more solid footing than a presumption that the favored employees were free from fault." Flowers, supra, 552 F.2d, at 1284.

The Seventh Circuit was correct in reversing and remanding the case for lack of comparative data on the performance of the preferred employees. The Second Circuit was less than correct in failing to reach the same result in the case at bar. McDonnell Douglas and McDonald require a more solid footing than a presumption that the favored employees were free from fault.

Unless the issue presented herein is resolved by this Court, it seems clear that the two Circuit Courts of Appeal will continue to follow their differing interpretations of McDonnell Douglas, supra. Since the issue will arise frequently in the future, it is in the public interest that the petition herein be granted by this Court.

CONCLUSION

For the foregoing reasons, the petition herein should be granted.

Respectfully submitted,

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August 10, 1978

APPENDICES

APPENDIX A

JUDGMENT AND OPINION BELOW

UNITED STATES COURT OF APPEALS

for the

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 1st day of March, one thousand nine hundred and seventy-eight.

Present:

HONORABLE J. EDWARD LUMBARD
HONORABLE WILFRED FEINBERG
HONORABLE WILLIAM H. TIMBERS
Circuit Judges.

WINSTON E. FISHER, Plaintiff-Appellant, -against- THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ALBERT ROGART, NORMAN RUBENSTEIN and COMMUNITY SCHOOL BOARD, DISTRICT 18, Defendants-Appellees.	77-7472

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is AFFIRMED.

Winston E. Fisher appeals from an order of Judge Weinstein in the United States District Court for the Eastern District of New York, dismissing appellant's claim under Title VII of the 1964 Civil Rights Act, 42 U.S.C. §§ 2000e et seq.

Appellant argues that his complaint should not have been dismissed because defendants failed to show that the refusal to continue hiring appellant as a per diem substitute teacher did not constitute unlawful discrimination. However, appellant's own case established that defendants' refusal to hire was based on appellant's record of repeated tardiness. Appellant concedes that lateness is an appropriate factor in evaluating prospective employees, and it is clear that once it is established that the employer had a "legitimate, nondiscriminatory reason for the employee's rejection," the burden of proof shifts to the plaintiff "to show that [the employer's] stated reason for [the applicant's] rejection was in fact pretext." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-04 (1973). Therefore, since appellant failed to demonstrate that tardiness was used as

a pretext despite the district court's invitation to do so, appellant's case was properly dismissed.

We have considered all of appellant's arguments and find them to be without merit. The judgment is affirmed.

S/ J. Edward Lumbard
J. EDWARD LUMBARD

S/ Wilfred Feinberg
WILFRED FEINBERG

S/ Wm. H. Timbers
WILLIAM H. TIMBERS

Circuit Judges

APPENDIX B

JUDGMENT ON PETITION FOR RE-HEARING EN BANC

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of May, one thousand nine hundred and seventy-eight.

WINSTON E. FISHER, Plaintiff-Appellant v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ALBERT ROGART, NORMAN RUBENSTEIN and COMMUNITY SCHOOL BOARD DISTRICT 18, Defendants-Appellees	Docket No. 77-7472

A petition for rehearing containing a suggestion that the action be reheard en banc having been filed herein by counsel for the plaintiff-appellant, and no active judge or judge who was a member of the panel having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

S/ Irving R. Kaufman
IRVING R. KAUFMAN, Chief
Judge

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 15th day of May, one thousand nine hundred and [seventy] eight.

Present: HON. J. EDWARD LUMBARD
HON. WILFRED FEINBERG
HON. WILLIAM H. TIMBERS
Circuit Judges

WINSTON E. FISHER, Plaintiff-Appellant v. THE BOARD OF EDUCATION OF THE CITY OF NEW YORK, ALBERT ROGART, NORMAN RUBENSTEIN and COMMUNITY SCHOOL BOARD DISTRICT 18, Defendants-Appellees	Docket No. 77-7472

A petition for a rehearing having been filed herein by counsel for the plaintiff-appellant.

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk

APPENDIX C

U.S. DISTRICT COURT'S ORAL OPINION

[109] THE COURT: Thank you, Madam.

Next witness, please.

(Witness excused.)

MR. GORMLEY: Your Honor, at this time, and I again point to the McDonnell Douglas v. Green case, I think the burden of proof to show non-discriminatory--

THE COURT: Get me the case.

MR. GORMLEY: -- has shifted to --

THE CLERK: Citation, please.

MR. GORMLEY: It's in my trial brief.

THE COURT: Yes, it's in the brief.

MR. GORMLEY: At --

THE COURT: Are you resting?

MR. GORMLEY: Resting subject to recall of my client for rebuttal, your Honor, according to the order of proof as outlined in the McDonnell Douglas case.

THE COURT: Are you resting?

MR. GORMLEY: Only if I have the Court's assurance I can recall the witness.

THE COURT: I want to know if your case is in, because I don't think you have made out a prima facie case.

[110] MR. GORMLEY: The citation is 411 US 792.

Your Honor, that case says that the complainant in a Title 7 action must show first that he belongs to a racial minority. And I submit we have done that here.

THE COURT: You have.

MR. GORMLEY: Secondly, that he applied and was qualified for the job for which the employer was seeking applicants.

THE COURT: You have not shown that.

There are a number of qualified people, but the question here is where there is a question of choice, who is better qualified.

Now, if the principal thinks other people are better qualified in good faith without respect to race, I don't think you have made a prima facie case.

MR. GORMLEY: That's the burden, sir, of the defendants, to show that --

THE COURT: I don't believe you are right on that in the circumstances.

We have your own evidence showing that this is a matter of choice and discretion.

If a principal has a number of

people [111] available and he chooses among them based on his evaluation of their capacity, I don't see how you made out a case.

There may be a thousand people qualified as substitutes. The City is full of people who are technically qualified. But just because you're technically qualified in that sense, and you haven't been called as a substitute, you don't make out a prima facie case. Otherwise every black who hasn't been called as a substitute in this school could make out a prima facie case, which is somewhat absurd.

MR. GORMLEY: Your Honor, it's a question of making out a prima facie case in the sense of shifting the burden to the defendants.

THE COURT: There is no burden to be shifted. You haven't proved any discrimination. You proved that this plaintiff was not selected as a per diem substitute. And the evidence here that you have submitted shows that Rogart believed that he was not as qualified as others, and showed a whole host of instances, including some you have shown, where he hasn't been satisfactory.

The only evidence that your witness gave on [112] this point was the evidence of the plaintiff himself through double hearsay that a principal said that he wasn't going to appoint him because he had appealed an unsatisfactory ruling. But that has nothing to do with race. That's a First Amendment problem. But your time on that has long since expired.

Let me check the McDonnell Douglas case.

MR. GORMLEY: The language in particular, sir, begins on about page 802.

THE COURT: If you want to recall your witness, I will allow your witness to testify.

MR. GORMLEY: The only purpose for which I would recall the witness would be to answer what I believe are the claims of the defendants that they had a legitimate reason for not rehiring him.

THE COURT: The deposition that is your exhibit is replete with evidence of basis for rejection.

MR. GORMLEY: It's not my exhibit in entirety, but only those portions I outlined.

THE COURT: Well, it's in evidence.

(A pause in the proceedings.)

THE COURT: I will let you give evidence that [113] he stated reasons for failing to hire this plaintiff on a per diem basis was a pretext. But your own evidence contains information with respect to that reason.

MR. GORMLEY: I think under McDonnell Douglas and the two cases I have cited in the brief following it, the claimant under Title 7, sir, does not have to have a perfect record by any means.

THE COURT: Certainly not. Nobody has a perfect record in the school system. And nobody expects him to have.

The question is whether having been excessed -- which is a term of art, not one which I would have chosen myself -- under the union contract, he had to be hired on a per diem basis.

And there is ample evidence in the record that he wasn't hired on a per diem basis because of a variety of failures on his part and not because of any racial decision.

You have not established he was not hired by reason of race.

Here is a school almost one hundred percent black in a black neighborhood at the time there was a shortage of teachers. You have a plaintiff here [114] who is a well spoken person. You haven't given any reason why they would want to keep him out on racial grounds. You haven't established that Weiss was in face [sic] employed more than he was or he was a better teacher than Weiss or that he was a better teacher than any of the other people who may have been employed.

This is not a McDonnell Douglas type record.

Now, under McDonnell Douglas what I would be required to do, reading it most favorably to the plaintiff, is to give you the opportunity to meet what you, yourself, have established, and that is the reason for not hiring, which is

lateness, absence from the classroom on a number of occasions. Those are serious matters because they didn't just happen once.

Here the deposition says -- without respect to what happens subsequently when there was continued lateness and other problems, missing a class, three latenesses, missing two classes, missing a class, lateness, lateness, missing a class, missing a class, lateness, lateness, per diem teacher being late according to this deposition he was late continuously.

[115]With all due respect to Miss Mary McAulay, I just don't believe that the system operates in that slovenly manner.

How can you take care of the children if they don't have teachers in the classroom?

Now, I don't make any finding with respect to the competence of this teacher. As far as I am concerned he has been the most competent teacher in the school system. The only question before me is whether you have established that the reason he was dismissed was because of race. And that is not established by this record.

Now, if you want me to consider it, reconsider it and call another witness. I would be happy to consider it.

MR. GORMLEY: Your Honor, I will call Mr. Fisher back. But let me say this: It's the subjective good will of the defendants here, the employer, is not in

issue, as I understand the works of McDonnell Douglas.

THE COURT: The works of McDonnell Douglas and all of these cases requires the Court to reach some assurance whatever the burden of proof may be. And giving you the benefit of McDonnell that the [116] reason for discharge and failure to hire was racial. And there is nothing in the record to establish that, except the fact that the principal was white and the plaintiff was black. And in this day and age that's not sufficient. There are many people who aren't hired because they are blacks. And those cases we take care of.

But because a black person isn't hired doesn't entitle him to damages if the person fails to hire in good faith and for other reasons doesn't want him as an employee.

MR. GORMLEY: The Board of Education itself, sir, in the lengthy appeal of the U rating given in June, '72 reversed the finding of its own principal on latenesses.

THE COURT: We have already had testimony from Mrs. McAulay that many of these U ratings are reversed. And again, that doesn't refer to race.

MR. GORMLEY: In addition, sir, the broad discretion claimed by the defendant to its principal and to which the principal testified to on several occasions in the record before you of the deposition, is exactly the type of case where it's most difficult to show discrimination.

[117] THE COURT: I understand you have a problem. But you do have a problem. Here we have a showing of a reason for failing to hire him. And there is nothing in the record that leads me to believe that that was a pretext.

MR. GORMLEY: Let me recall Mr. Fisher then.

THE COURT: I will be happy to hear from him.

Do you want to discuss it with him before you recall him?

MR. GORMLEY: No, sir.

THE OURT: I will be happy to hear him.

W I N S T O N E. F I S H E R, having been previously sworn, resumes the stand and further testifies as follows:

FURTHER DIRECT EXAMINATION

BY MR. GORMLEY:

Q. Mr. Fisher, at a time in September of 1972 when you were called on several occasions to be a per diem substitute in Junior High School 252, how were you informed of the fact that you were to work as a per diem substitute?

A. By telephone.

Q. When?

A. In the morning.

* * * * *

* * * * *

[129] MR. GORMLEY: Thank you, sir.

Your Honor, I would at this time point out to the Court that in the deposition of Mr. Rogart, he said specifically with per diem teachers, that after Mr. Fisher he didn't hire another black per diem teacher until after 1974 because of his peculiar control as principal over the per diems. It's a ripe area of scrutiny of him by --

THE COURT: Excuse me.

(Whereupon there is a discussion taken up by the Court on an unrelated matter with unrelated counsel.)

MR. GORMLEY: Your Honor, that's all I have for Mr. Fisher.

Again with respect to the exhibits, there are two latenesses shown in the official book in Ms. Kerlin's affidavit for Mr. Fisher, and many, [130] many latenesses for other teachers who, unfortunately, are not identified.

Moreover, there are a number of satisfactory ratings, now, both before and after the events of fall, '72, in evidence. All of these forms have a little preprinted statement,

for latenesses, and some of them have it broken down to hours and days and minutes. For some of these the latenesses are filled in and others it is not. And in all events the marking is satisfactory. And the recording of latenesses is a whim and whisk thing by the Board of Education. It is something they could use on someone they wanted to get rid of.

THE COURT: I don't think I can find this on the record.

If you have a principal who has a choice, obviously he is going to take people who come in on time.

For the substitute jobs, I just don't have any finding that there was any discrimination against this plaintiff that I can possibly make on this record.

MR. GORMLEY: Sir, I respectfully except and I say there is an issue of fact as to time. The [131] witness here denied he was ever late as a substitute.

THE COURT: No, he never denied that at all.

MR. GORMLEY: Except for that one incident.

THE COURT: No, he has not denied that at all. He indicated he

was late at the time he signed in at the book. And the record indicates that was not an uncommon practice, but he was not in his class where the principal checked. And many of these other latenesses are not based on the principal's observation, but on reports which the principal could credit.

I am not making any finding as to the competence of this teacher. There is no reason that I should make that finding. I don't have enough information on it, and it's not relevant.

The information before me, however, is that the principal had a basis for determining that this was not reliable substitute teacher based on his past record and his record as a substitute, and that that was the reason that he was not hired, not because of his race.

And there is no evidence at all that that's a pretext. And I can't find it.

I must say I simply do not credit the testimony [132] of Ella Gardner with respect to people coming out of the bushes. I just don't believe that a principal would remain a principal in the New York City school system if he went around making statements like that in public. I just put that out of the record.

But based on the testimony of

Mrs. McAulay and the plaintiff and Miss Pecker and the deposition and the exhibits, there is no case in my opinion.

MR. GORMLEY: Your Honor, with respect to what a principal in the school of New York City would say or not say, we had an unhappy incident here this afternoon by a loss of control by the same principal.

THE COURT: The principal does not impress me. But that's not my basis of finding racism.

MR. GORMLEY: Your Honor, may I have a five minute break?

THE COURT: Yes, you may, certainly.

MR. GORMLEY: Thank you.

(A recess is taken.)

MR. GORMLEY: Your Honor, thank you for your indulgence. Let me finish up here, if I may, with my argument.

[133] I respectfully point out that I think in some respects that the Court at this point is making decisions of fact. You made a reference to Mrs. Gardner's testimony and you are not believing it.

I think in addition there is sufficient denial of the lateness here, not only out of my client's mouth, but by implication in the

documents and by the Board of Education itself in criticizing Mr. Rogart's handling of the situation in the spring of '72, and by Mr. Rogart's admission in his EBT.

The problem he saw in the fall of '72 was not anything more than what was going on in the following year. And he said it was lateness, it was lateness, and that was the whole thing, although counsel had objected. And all of this was immaterial in his exercise of judgment there, your Honor.

I think, your Honor, there is an issue of fact here and the defendants should be directed to put in their case.

THE COURT: I don't see it on the basis of your testimony.

MR. GORMLEY: We have no burden to show express or subjective discrimination. Under [134] McDonnell Douglas, sir, I believe it works as a matter of law in a situation like this.

THE COURT: They have shown a reason which I find insufficient [sic] to have favored other per diem substitutes to this plaintiff. So that there is no racial issue in the case after the finding. There is no showing on your part that it's a pretext. I just do not accept your argument based on this record.

MR. GORMLEY: The plaintiff rests.

THE COURT: On the merits the case must be dismissed.

The Court finds that the plaintiff is a black. The principal mainly charged with racial discrimination here is white. The principal had a basis for favoring other per diem substitutes over this plaintiff, in that he had reasonable cause for believing that this plaintiff was not sufficiently prompt in his attendance to his duties. His favoring of other per diem substitutes was based not on any racial considerations, but on administrative considerations entirely apart from race.

The reason for making this judgment by the principal was not, insofar as the record shows, by [135] any preponderance of evidence either way a pretext. In fact, the evidence preponderates in favor of the defendants' contention that it was not a pretext.

Accordingly, under the law there is no alternative but to dismiss the case.

Now, are there any other findings of fact or law that either party wishes at this time?

MR. GORMLEY: No, sir.

MS. KERLIN: Your Honor, at this time I would like to move for costs.

THE COURT: Denied.

MR. GORMLEY: Thank you, your Honor.

THE COURT: Anything further?

MS. KERLIN: No, your Honor.

THE COURT: Now, you understand, Mr. Fisher, that I am not finding that you are a bad teacher or a good teacher or that you were late or that you weren't late. Is that clear?

All I am finding is that based on the law and the facts as they have been established here many years after the event, the case has not been shown sufficiently to permit me to grant you relief. You understand that?

MR. FISHER: Yes, your Honor.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

§ 2000e-2. Unlawful employment practices --Employer practices

(a) It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

APPENDIX E

PAGE 14 OF RESPONDENTS' BRIEF IN THE COURT OF APPEALS (EXCERPT).

(3)

Plaintiff devotes a substantial portion of his brief to an argument that he made out a prima facie case at trial (App. Br., pp. 17-22). The argument is irrelevant because he, unlike the plaintiff Green in the McDonnell Douglas case, was not deprived of an opportunity to show that the employer's assigned reason for rejection was a pretext. Judge Weinstein repeatedly and correctly articulated the rules laid down in McDonnell Douglas and gave plaintiff every opportunity to make the evidentiary showing required by that decision.

APPENDIX F

POINT II OF FISHER'S BRIEF
IN THE COURT OF APPEALS

POINT II.

UNDER TITLE VII STANDARDS, ROGART AND THE BOARD OF EDUCATION DID NOT PROVE THAT THEIR SOLE REASON FOR ELIMINATING FISHER FROM CONSIDERATION WAS APPLIED IN A NON-DISCRIMINATORY MANNER

Fisher does not contend that applicants for employment or re-employment cannot be selected or measured by a single criteria, such as lateness. This is a matter entirely in the discretion of the principal, subject to such guidelines as the District Superintendent or Chancellor of the Board of Education may prescribe. Any objection to selecting personnel on the basis of a single criteria would be a matter for the Community School Board or central Board to consider, not a matter for this Court.

The central and all-important contention by Fisher on this appeal is that Congress, in enacting Title VII, established a policy binding upon Rogart and the Community and central Boards that any such single criterion or criteria must be applied in a fair and non-discriminatory manner. Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 806 (1973).

On this appeal, Fisher relies exclusively upon his Title VII claim. For, while his §1981 claim is "analogous",

Huntley v. Community School Board of Brooklyn, 543 F. 2d 979, 983, note 6 (2nd Cir., 5/12/76), the Title VII claim need not concern itself "with the employer's possibly discriminatory purpose but instead may focus solely on the racially differential impact of the challenged hiring or promotion practices." Washington v. Davis, 426 U. S. 229, 238-239 (6/7/76). Title VII "involves a more probing judicial review of, and less deference to, the seemingly reasonable acts of administrators and executives * * * where special racial impact, without discriminatory purpose, is claimed." Id. at 247.

Title VII of the Civil Rights Act of 1964 prohibits the discharge of, or failure or refusal to hire "any individual" because of "such individual's race * * * or national origin", §703 (a)(1), 42 U.S.C. §2000e-2(a)(1).

By this Act, "Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race * * * or national origin." Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976) (emphasis supplied); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974); McDonnell Douglas Corp. Green, supra, 411 U.S. 792, 800 (1973); Griggs v. Duke Power Co., supra, 401 U.S. 424, 429-430 (1971).

Title VII is not concerned with the employer's "good intent or absence of discriminatory intent" for "Congress directed the thrust of the Act to the

consequences of employment practices, not simply the motivation." Albemarle Paper Co. v. Moody, 422 U.S. 405, 422 (1975) (emphasis in original); Griggs v. Duke Power Co., supra, 401 U.S. at 432. See also Watson v. City of Memphis, 373 U.S. 526, 535 (1963); Wright v. Council of City of Emporia, 407 U.S. 451, 461-472 (1972).

Thus, two white employees of a transportation company could legitimately complain under Title VII when they were discharged for misappropriating cargo from one of the company's shipments, but a black employee, who was also charged with the same offense, was not discharged. McDonald v. Santa Fe Trail Transportation Co., 427 U.S. 273 (1976). In upholding the Title VII claim of the white employees, the Court quoted McDonnell Douglas Corp. v. Green, supra, which it found to be "indistinguishable", for the proposition that, "Especially relevant to a [Title VII] showing would be evidence that employees [of a different race] involved in acts * * * of comparable seriousness * * * were nonetheless retained or rehired." 427 U.S. at 282. The Court held that illegal or criminal conduct, while certainly a legitimate basis for discharge, is "hardly one for racial discrimination." 427 U.S. at 283. Seriousness of the offense "does not diminish the illogic in retaining guilty employees of one color while discharging those of another color." 427 U.S. at 284.

If they stand for anything, McDonnell Douglas, supra, and its "indistinguishable" companion, McDonald, supra, stand for the

proposition that the reason given by the employer must be free from the taint of discriminatory application.

In the case at bar, the official records of the school were extracted and coded by counsel for Rogart and the Community and central Boards. (App. 46-52.) These records show that teachers with worse records for lateness* than Fisher were nevertheless retained* or rehired* as per diem substitutes to perform work for which Fisher had applied, but was rejected solely on the ground of lateness. (App. 76, 78, 79, 106.) Rogart could not "recall" in 1977 (EBT, Pl. Ex. 66 in Evi.) even one of these per diem substitutes, who was either born in the British West Indies (App. 142-144) or was black (App. 127-128.) Since he is in possession of the

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* Teachers with worse records for lateness than Fisher from February, 1972 through June, 1972 who were preferred over Fisher and hired as per diem substitutes in September, 1972 and October, 1972: Single A, E, I, Z; Double K, N, U, V; Triple H, K, T, V; and Quadruple F, G, N. (App. 46-52.) The trial court seemed to think Fisher's record for lateness was excessive. (App. 18-20.) Fisher certainly does not concede this and the evaluations of the Chancellor, the Boards and the official school records do not support such a view. (App. 34-50.)

school records analyzed by his counsel in order to preserve their confidentiality, presumably he has had the opportunity to refresh his recollection since March 2, 1973, the date Fisher's EEOC charge of Discrimination against him was filed.

Rogart does not claim that he ever compared Fisher's record for lateness in any careful or responsible way with that of the white teachers he preferred as per diem substitutes over Fisher, on the purported ground of "lateness". He claims absolute discretion in hiring of per diem substitutes. (App. 78, 87-88, 99, 101.) Apparently, this comparison was finally forced upon him only by litigation in federal court in this action. Yet, forms supplied by the central Board for all teachers provide a convenient method for comparison, on an annual or semi-annual basis, of records of absence and lateness. (App. 34-39.) Rogart never claimed he used them.

"Absolute discretion over employment decisions where subjective race prejudice may control (perhaps even without the executive's knowledge) is no longer consistent with our law." Abrams v. Johnson, 534 F. 2d 1226, 1231 (6th Cir., 1976). In Abrams, the employer's manager made a spontaneous selection of a white employee because she had performed substantially the same work at another Veterans Administration hospital, thereby eliminating a group, including at least one negro, under consideration as part of an established hiring procedure.

The manager in Abrams is no different

from Rogart in the case at bar. Both acted spontaneously, without Title VII considerations in mind, and both ran afoul of Title VII. One disregarded an established hiring procedure, designed to give weight only to non-discriminatory reasons. Apparently the other, (Rogart) had no procedure of his own and none supplied to him by either the Community or central Board.* It comes as no surprise that under these circumstances Fisher was the victim of an employment practice "fair in form, but discriminatory in operation." Griggs v. Duke Power Co., supra, 401 U.S. 424, 431 (1971); Gillin v. Federal Paper Board Company, Inc. 479 F. 2d 97, 102 (2nd Cir., 1973); Jackson v. City of Akron, 411 F. Supp, 680, 688-689 (N. Dist. Ohio, 1976); King v. New Hampshire Dept. of Resources, 420 F. Supp. 1317, 1321, 1328-1329 (Dist. N.H., 1976).

* There has been no allegation or offer of proof that Fisher was rejected pursuant to any established hiring procedure designed to give weight only to non-discriminatory reasons. The procedures in use presently and in 1972 are described in Rogart, (App. 78-79, 99-101.)

APPENDIX G

PAGES 12-14 OF RESPONDENTS' BRIEF IN THE COURT OF APPEALS

(2)

The evidence in this record indicates that only Mr. Fisher and Mr. Weiss worked for Mr. Rogart, the principal, and subsequently were considered for per diem work in the Fall, 1972 term. As noted above, plaintiff made no attempt to compare his record with that of Mr. Weiss. Furthermore, contrary to plaintiff's contention, there is no evidence in this record regarding the employment record of any of the per diem substitutes who were used by Mr. Rogart during the Fall, 1972 term.

Plaintiff's contention that there is such evidence is based upon a clearly mistaken reading of two exhibits in evidence. See, App's Br., pp. 10, 16, 26-27.

The first exhibit is an affidavit of Norma Kerlin, an assistant corporation counsel, which summarized the contents of the Teacher Time Book in use in J.H.S. 252 during the Spring, 1972 term (46-50). The exhibit abstracts the record of latenesses for each teacher at the school on a monthly basis. A letter code is used to identify the teacher involved (except for plaintiff) pursuant to an agreement between counsel designed to protect the confidentiality of the teachers involved.

The second exhibit consists of charts depicting the days when per diem substitutes were used at J.H.S. 252 in

September and October of 1972. (51-52). The charts use a code number* along the left margin to identify the teacher who is performing the per diem work. The column is marked at the top with the notation "per diems". The horizontal row of numbers along the top of the chart, as labeled, indicates the day of the month when a substitute was used. The letters in the intersecting spaces refer to teachers who were absent on the given day and for whom a replacement teacher was hired. These teachers are identified by the same letter code used in the preceding exhibit.

The coded numbers used in the chart reflecting the per diem substitutes who were hired do not refer to any teacher who was employed at J.H.S. 252 the previous spring term, except for number 4, which denotes Mr. Weiss, and No. 9, which refers to Mr. Fisher. It is absurd to suggest, as plaintiff does for the first time on appeal, that the chart indicates that the letter-coded teachers, all of whom taught at the school the previous spring, were used as per diem substitutes in the fall of 1972. The record indicates that only two teachers, including plaintiff, were excessed from the school in September, 1972. When plaintiff's counsel referred to the per diem chart at trial, he clearly understood

* Copies of the letter and number keys were given to the Court and to plaintiff's counsel during the trial (Trial transcript, p. 125).

that it only indicated when per diem jobs were available and how often teachers other than plaintiff were used (Trial transcript, p. 124-125). If the charts indicated that white teachers with worse records of lateness than plaintiff were preferred over plaintiff for per diem work, it would be astonishing that plaintiff's counsel did not specifically refer the Court to this fact at trial.